

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

TREASURY SOLUTIONS HOLDINGS, INC., a Georgia corporation, successor in interest to TREASURY SOLUTIONS, LLC, a Georgia limited liability company, f/k/a GIF PLAN ADVISORS, LLC, a Georgia limited liability company, successor in interest to GIF SERVICES, LLC, a Georgia limited liability company,)	3:10-CV-00031-LRH-WGC
)	
)	<u>ORDER</u>
)	
)	
Plaintiffs,)	
)	
v.)	
)	
UPROMISE, INC., a Delaware corporation;)	
UPROMISE INVESTMENTS, INC., a Delaware corporation; THE VANGUARD GROUP, INC., a Pennsylvania corporation; JOHN DOES 1 through 10, individuals; ABLE-BAKER COMPANY 1-10, partnerships; and BLACK & WHITE INC. 1-10, corporations,)	
)	
Defendants.)	
)	

Before the Court is Defendants Upromise, Inc. (“Upromise”) and Ascensus Broker Dealer Services, Inc.’s (“ABDS”), formerly known as Upromise Investments, Inc.’s (collectively, “Defendants”) Motion to Certify Question of Law to the Nevada Supreme Court. Doc. #99.¹

///

¹ Refers to the Court’s docket number.

1 Plaintiff Treasury Solutions Holdings, Inc. (“Treasury Solutions”) filed a Response (Doc. #103), to
2 which Defendants replied (Doc. #107).

3 **I. Facts and Background**

4 This litigation revolves around the State of Nevada’s 529 College Savings Plan (“CSP”)
5 program. The State of Nevada contracted with Treasury Solutions to create the CSP program, and
6 contracted separately with Defendants to manage and administer that program. There is no direct
7 contractual relationship between Treasury Solutions and Defendants. On May 11, 2006, the State
8 of Nevada Board of Examiners approved an Amendment to the Upromise contract that relieved
9 Treasury Solutions of further obligation to provide services to the State in exchange for a reduction
10 in compensation. Treasury Solutions alleges that Defendants thereafter coerced the State to remove
11 certain terms from this amendment, specifically a term requiring automatic payments to Treasury
12 Solutions to ensure that fees were paid. Treasury Solutions further alleges that Defendants coerced
13 the State to breach its contract with Treasury Solutions and cease payments that were already owed.
14 On December 28, 2006, the Board of Examiners approved a new amendment terminating its
15 contract with Treasury Solutions and assigning its fees to Upromise.

16 In a related State court action,² Treasury Solutions sued the State of Nevada for breach of
17 contract. On December 28, 2009, Treasury Solutions filed the present action against Defendants,
18 alleging claims for tortious interference with contractual relations and tortious interference with
19 prospective business advantage.³ See Doc. #1. On January 6, 2012, the Court granted Defendants’
20 Motion to Dismiss with prejudice, finding that Treasury Solutions’ claim was barred by the statute
21 of limitations and that amendment would be futile. Doc. #61. On March 27, 2014, the Ninth
22 Circuit Court of Appeals reversed the Court’s dismissal, finding that a tortious interference claim

23
24 ² *Treasury Solutions et al. v. State of Nevada et al.*, Case No. 11-OC-00268, in the First Judicial
District Court in and for the County of Carson City, Department II.

25 ³ Treasury Solutions’ claim for interference with prospective economic advantage was not included
26 in the Second Amended Complaint. See Doc. #87.

1 does not accrue until the plaintiff has incurred actual damages, which in this case would have
 2 occurred “on some unspecified date in January 2007.” Doc. #69.

3 On May 30, 2014, the Court granted Defendants’ Motion to Stay Proceedings. Doc. #80.
 4 Treasury Solutions filed its Second Amended Complaint on January 5, 2015. Doc. #87.
 5 Defendants filed a Motion to Dismiss the Second Amended Complaint on February 25, 2015.
 6 Doc. #92. On June 25, 2015, the Court granted Defendants’ Motion to Dismiss in part, but denied
 7 the Motion as to Treasury Solutions’ claim for tortious interference with contractual relations.
 8 Doc. #96. The Court denied the Motion as to this claim after finding that a 2013 Nevada Supreme
 9 Court decision, *Cucinotta v. Deloitte & Touche, LLP*, did not expressly apply an absolute privilege
 10 for a party’s legal duty to advise the state. *Id.* at 4-6. Defendants filed the present Motion to
 11 Certify Question of Law on July 23, 2015. Doc. #99.

12 **II. Legal Standard**

13 Nevada Rule of Appellate Procedure 5 grants the Nevada Supreme Court the power to
 14 “answer questions of law certified to it by the Supreme Court of the United States, a Court of
 15 Appeals of the United States or of the District Columbia, a United States District Court, or a United
 16 States Bankruptcy Court.” The United States Supreme Court has acknowledged that “certification
 17 of novel or unsettled questions of state law for authoritative answers by a State’s highest court . . .
 18 may save ‘time, energy, and resources and hel[p] build a cooperative judicial federalism.’”
 19 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (quoting *Lehman Bros. v. Schein*,
 20 416 U.S. 386, 391 (1974)). Certification is not mandatory, and “when a federal court confronts an
 21 issue of state law which the state’s highest court has not addressed, the federal court’s task typically
 22 is to predict how the state’s highest court would decide the issue.” *Carolina Cas. Ins. Co. v.*
 23 *McGhan*, 572 F. Supp. 2d 1222, 1225 (D. Nev. 2008). “When a party requests certification for the
 24 first time after losing on the issue, that party must show ‘particularly compelling reasons’ for
 25 certifying the question.” *Id.* at 1226 (quoting *Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir.
 26 1984)).

1 III. Discussion

2 Defendants request that the Court certify the following question to the Nevada Supreme
 3 Court: “does the absolute privilege adopted by the Nevada Supreme Court in *Deloitte* apply to a
 4 claim for tortious interference with an existing contract?” Doc. #99 at 2. The Court previously
 5 declined to read *Deloitte* as extending this absolute privilege to claims for tortious interference with
 6 an existing contract—as opposed to claims for tortious interference with prospective advantage—at
 7 the pleading stage because case law indicated clear precedent applying this privilege to claims
 8 based on prospective advantage, but not existing contracts. Doc. #96 at 5-6; *see Nationwide*
 9 *Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1055 n.2 (9th Cir. 2008) (noting that while
 10 Nevada law requires plaintiff to prove absence of a privilege for intentional interference with
 11 prospective advantage, “Nevada has not yet held that a plaintiff alleging intentional interference
 12 with contractual relationship must also prove the absence of privilege or justification.”). Absent
 13 express language changing this precedent, the Court declined to adopt a rule requiring plaintiff to
 14 plead absence of a privilege of justification to survive a motion to dismiss a claim for intentional
 15 interference with an existing contract.⁴ The Court notes that Defendants relied on *Deloitte* in their
 16 Motion to Dismiss the Second Amended Complaint to argue that “absence of privilege or
 17 justification” is a “sixth element” of a claim for intentional interference with an existing contract.
 18 Doc. #92 at 8. Thus, the relevant question was whether *Deloitte* requires a plaintiff to plead
 19 absence of a privilege or justification to survive a Motion to Dismiss.

20 Defendants argue that *Deloitte* changed the existing precedent, and that a plaintiff must now
 21 plead absence of an absolute privilege to survive a Motion to Dismiss a claim for interference with
 22 existing contract. In *Deloitte*, the plaintiff “alleged that Deloitte published defamatory
 23

24 ⁴ The Court also found that the privilege for advising a sovereign entity does not apply. Doc. #96 at
 25 6-7; *see Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990) (“The chief practical
 26 distinction between interference with contract and interference with prospective economic advantage is that
 a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered
 with is only prospective.”).

1 statements . . . and knowingly interfered with [plaintiff's] contractual relationships and prospective
2 economic advantage.” *Deloitte*, 302 P.3d at 1100. The Court ultimately held: “Deloitte’s
3 communications are subject to an absolute privilege, precluding appellants’ defamation claim. In
4 that regard, we also conclude that appellants’ tortious interference claim is precluded because
5 Deloitte’s communications and conduct is afforded an absolute privilege.” *Id.* at 1102. *Deloitte*
6 involved a single claim for interference with contractual relations *and* prospective economic
7 advantage. *Deloitte* applied the absolute privilege, but did not state whether it did so based solely
8 on the claim for interference with prospective economic advantage, or whether it was extending the
9 privilege to claims based on interference with existing contractual relations. Importantly, the cases
10 cited by the Nevada Supreme Court to support their application of the absolute privilege both
11 discuss prospective economic advantage, not existing contractual relations. *See Wichinsky v. Mosa*,
12 847 P.2d 727, 729 (Nev. 1993); *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S.*
13 *Nev.*, 792 P.2d 386, 388 (Nev. 1990).

14 The Nevada Supreme Court has held that certification is appropriate when its answers may
15 be determinative of part of the federal case, there is no controlling Nevada precedent, and the
16 answer will help settle important questions of law. *Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d
17 1161, 1164 (Nev. 2006) (adopting California’s liberal standard). Ultimately, *Volvo Cars*
18 determined that certification was not appropriate because the questions posed “would not ‘be
19 determinative’ of any part of the case, but rather, would resolve only a discrete evidentiary issue.”
20 *Id.* Defendants argue that certification would be determinative here because “application of the
21 privilege would lead to dismissal of Treasury Solutions’ interference claim,” which is Treasury
22 Solutions’ only surviving cause of action. Doc. #99 at 5. Treasury Solutions correctly points out
23 that even if the Nevada Supreme Court determined that the privilege applied, “there would still
24 exist a question of fact as to whether or not the conduct complained of here falls under that
25 privilege” and bars this cause of action. Doc. #103 at 6.

26 ///

1 *Deloitte* specified that “[t]he class of absolutely privileged communications recognized by
2 this court remains narrow and is limited to those communications made in judicial or quasi-judicial
3 proceedings and communications made in the discharge of a duty under express authority of law.”
4 302 P.3d at 1102. Here, even if the privilege were to apply to intentional interference with
5 contractual relations, a question would remain regarding whether the privilege applied, i.e., whether
6 the communications at issue were made in quasi-judicial proceedings or pursuant to a duty under
7 express authority of law. In *Deloitte*, the communications were made under express authority of
8 law because “[w]hen an accounting firm becomes aware of information that an illegal act has
9 occurred or may occur, then it must adequately inform the appropriate level of management of the
10 issue . . . about the detected illegal acts as soon as practicable.” *Id.* (citing 15 U.S.C. § 78j-
11 1(b)(1)(B)). It remains unclear whether such a duty would apply here, or whether Defendants’
12 conduct would fall under any such duty. Thus, it appears that an answer by the Nevada Supreme
13 Court would not be determinative of a part of this case.

14 In the absence of clear state precedent, “the federal court’s task typically is to predict how
15 the state’s highest court would decide the issue.” *Carolina Cas. Ins. Co.*, 572 F. Supp. 2d at 1225.
16 The Court again notes that courts have clearly held that “Nevada has not yet held that a plaintiff
17 alleging intentional interference with contractual relationship must also prove the absence of
18 privilege or justification.” *Nationwide Trans. Fin.*, 523 F.3d at 1055 n.2. Defendants’ contention
19 that *Deloitte* requires plaintiffs to plead that “absence of privilege or justification” as a “sixth
20 element” to a claim for intentional interference with an existing contract is simply not supported by
21 the case law following *Deloitte*. Nevada courts have long held that to plead intentional interference
22 with contractual relations, the plaintiff must allege: (1) existence of a valid contract; (2) defendant’s
23 knowledge of the contract; (3) intentional acts designed to disrupt the contractual relationship; (4)
24 actual disruption; and (5) resulting damage. *J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev.
25 2003). More than two years after *Deloitte*, courts in this district still list these five elements for a
26 claim for intentional interference with existing contract, and the Court is aware of no case that has

1 added a sixth element of “absence of privilege or justification” to this tort. *See, e.g., LT Int’l Ltd. v.*
2 *Shuffle Master, Inc.*, 8 F. Supp. 3d 1238, 1248 (D. Nev. 2014); *Phillips v. Dignified Transition*
3 *Solutions*, No. 2:13-cv-2237, 2015 WL 5056406, at *4 (D. Nev. Aug. 25, 2015).

4 The Court reaffirms its prior finding that absent a clear statement extending this absolute
5 privilege to claims for interference with an existing contract, the Court declines to dismiss a claim
6 that properly alleges the elements of intentional interference with an existing contract under
7 established Nevada Supreme Court precedent. The Court also finds that certification of
8 Defendants’ question of law to the Nevada Supreme Court is not warranted because Defendants
9 have not established that an answer would be determinative of a part of this case, even under
10 Nevada’s more liberal standard. Accordingly, the Court denies Defendants’ Motion to Certify.

11 **IV. Conclusion**

12 IT IS THEREFORE ORDERED that Defendants’ Motion to Certify Question of Law to the
13 Nevada Supreme Court (Doc. #99) is DENIED.

14 IT IS SO ORDERED.

15 DATED this 2nd day of November, 2015.

16 
17 LARRY R. HICKS
18 UNITED STATES DISTRICT JUDGE
19
20
21
22
23
24
25
26